IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 677 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

BALVANTSINGH @ NANIO KALYANSINGH RAJPUT

Versus

DEPUTY COMMISSIONER OF POLICE

Appearance:

Mr.H.R.Prajapati for MR HN JHALA for Petitioner

NOTICE SERVED for Respondent No. 1

Ms.S.S. TALATI, A.G.P. for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 24/11/98

ORAL JUDGEMENT

1. This writ petition under Article 226 of the Constitution of India has been filed seeking writ of certiorari for setting aside the orders dated 1.10.1997 of Deputy Police Commissioner, South Zone, Vadodara externing the petitioner from the limits of District Vadodara and Kheda and also consequential orders passed

by the Appellate Authority on 4.12.1997 dismissing the Appeal of the petitioner.

2. In exercise of the powers conferred under Section 10(2) of the Bombay Police Act the Deputy Commissioner of Police, South Zone, Vadodara (hereinafter called as "Externing Authority") passed an order under Section 56(B) of the Bombay Police Act against the petitioner after hearing the petitioner and considering the reply to the show cause notice issued to him on 7.5.1997 and also upon consideration of material on record including the defence placed by the petitioner before the Externing Authority. The order of externment was to remain in force for a period of two years. The Appellate Authority concurring with the view taken by the Externing Authority dismissed the Appeal of the petitioner. It is, therefore, this writ petition.

3. As many as six points were argued by the learned Counsel for the petitioner challenging the impugned orders. The learned A.G.P. on the other hand contended that factual new points cannot be permitted to be raised in writ petition and since only five points were raised in the Appeal, other points should not be permitted to be raised. I have considered the objection of the learned A.G.P. New allegations of facts cannot be permitted to be raised in a writ petition under Article 226 of the Constitution of India. Only legal points can be permitted to be argued and not the disputed questions of facts. Certain points raised during arguments are covered in Point No.1 raised before the Detaining Authority, viz. non-consideration of evidence adduced by the petitioner and non-consideration of the statement of witnesses examined by the petitioner. This point also covers indirectly that the impugned order is non-speaking and suffers from subjectivity and lacks objectivity. Likewise it covers the contention that the impugned order is against the principles of natural justice. Consequently the points raised by the learned Counsel for the petitioner are proposed to be discussed as under :

4. First contention has been that there was delay in passing the externment order. The externment order was passed on 1.10.1997. The show cause notice was issued to the petitioner on 7.5.1997. One case under Section 323, 325, 114, 506 Indian Penal Code and Section 135 of the Bombay Police Act was registered in the year 1994. It was urged that the cases against the petitioner under the Prohibition Act were not taken into consideration by the Externing Authority. The Externing Authority considered the statement of two witnesses. This contention seems to

be incorrect. The order of Externing Authority shows that statement of three witnesses recorded on 9.12.1996, 23.12.1996 and 21.2.1997 were taken into consideration. These witnesses on account of the fear of the petitioner refused to disclose their identity and requested for keeping their names and addresses secret. Consequently it is to be seen whether the externment order passed on 1.10.1997 suffers from the fatal defect of delay as computed from 21.2.1997 when the third witness was examined. Of course, from registration of first case under the Indian penal Code in the year 1994 there is considerable delay in passing the impugned order on 1.10.1997. Computed from 21.2.1997 when the last undisclosed witness was examined there seems to be further delay of about nine months. In support of his contention the counsel for the petitioner has referred to the case of Khemiben w/o Ishwarji Harchandji v/s. Deputy Police Commissioner, reported in 1997 (2) G.L.H. 473. In this case the externment order was passed after about more than one year. This unexplained delay was considered, in the aforesaid case to be fatal and the externment order was quashed. In the case before me also there is no explanation of this delay of about nine months. No Counter Affidavit has been filed from the side of the respondent explaining the reasons for delay in passing the impugned order of detention. Thus, unexplained delay of nine months is certainly fatal and impugned order is illegal and invalid. Learned A.G.P. on the other hand has relied upon a Division Bench pronouncement of this Court in Babubhai M. Shaikh v/s. State of Gujarat, reported in 1989 (1) G.L.R. 574. The ratio of this is that the Externing Authority must be subjectively satisfied that there exists grounds for passing externment order and there must also be material to show that witnesses were not prepared to depose against the externee. If these two conditions are satisfied merely because there is some delay or because the externee is in jail could not vitiate the order of externment. The contention raised by the learned Counsel for the respondent in the case before me was directly not under consideration before the Division Bench in Babubhai's case (supra). From Para : 9 of the said Judgment it is clear that according to Division Bench there was delay in passing the externment order, but this delay was considered to be insignificant. The delay was on another ground not on the grounds argued in this writ petition. The grounds of challenge in Babubhai's case were all together different. In that case externment order was passed on 4.8.1988. The hearing of the case before the Externing Authority was over on 1.3.1988. The externee submitted his written submissions and oral

arguments on 6.6.1988. Thereafter detention order was passed on 4.8.1988. This was considered to be insignificant delay. Hence, the detention order was held to be valid. Here the delay under consideration was the delay which took place in the conduct of proceeding whereas the point raised before me has been delay in passing the impugned order after disclosure of last unregistered case against the petitioner. Consequently this case does not help the learned A.G.P. The delay has not been satisfactorily explained by the respondent which has rendered the impugned orders invalid.

5. Next attack has been that the impugned order is a non-speaking order and is more or less order passed on subjectivity and lacks objectivity. It was contended that as many as 25 witnesses were examined by the petitioner before the Externing Authority and those witnesses remained uncross examined from the side of the respondent. Still those statements were brushed aside simply with the observation that the witnesses were close to the petitioner. This is not the way of assessing evidence. Simply because the witnesses were close to the petitioner their statements could not be disbelieved or brushed aside especially when they were not subjected to cross examination. Uncross examined statement on oath of a witness deserves reliance and it was brushed aside on extraneous considerations. Consequently the order suffers from the vice of subjectivity.

6. The order is also not a speaking order. An order can not be said to be speaking order simply because it runs in six pages. The conclusion of the Externing Authority is to the following effect.

> "Heard the submissions made by you and your Advocate. After carefully examining evidences produced for prosecution and defence at the end of discussion I am satisfied that there are sufficient evidences to believe that if your externment will not be made then you will continue your criminal anti-social activities. Therefore, there are sufficient and reasonable grounds for your externment."

From this it is clear that only subjective satisfaction was arrived at by the Externing Authority and not that there was slight discussion of evidence adduced by the petitioner and no ground for its rejection was given by the Externing Authority. The Appellate Authority simply observed that it seems that due to good relation with appellant they (which means witnesses) came to give evidence and it seems that they are suppressing

material facts. This is also nothing but subjective satisfaction of the Appellate Authority. No reason has been given why uncross examined statements could not be believed by the Appellate Authority and on what material quasi judicial authority made observation that the witnesses of the petitioner were suppressing material facts. In Jorubhai Aapabhai Kathi Darbar v/s. Sub-Divisional Magistrate, reported in 1996 (1) G.L.H. 53 this Court found that where the Externing Authority did not set out explanation given by the Externee the order of externment becomes totally non-speaking order as it does not disclose any reason or justification. Thus, for this reason also the impugned orders are rendered illegal.

7. The impugned order also suffers from the vice of non-application of mind to the material on record by the Externing Authority as well as by the Appellate Authority. The learned A.G.P., however, on the basis of pronouncement in Babubhai v/s. State of Gujarat (supra) contended that in this case subjective satisfaction of the Externing Authority was not disturbed and was up-held. However, in the case before me one material fact escaped the notice of the Externing Authority. The Appellate Authority, it seems from the material on record, came to the conclusion that a case under "PASA" was filed against the appellant - petitioner in the year 1996. This fact also weighed with the Appellate Authority in dismissing the Appeal. However, the Appellate Authority did not observe about the fate of PASA case, viz. whether the detention order in that case was confirmed or it was quashed on the motion of the petitioner under Article 226 of the Constitution of India, or whether any such writ petition was filed or not. Thus, without examining this matter thoroughly abrupt mention of registration of the case under the PASA in the year 1996 renders the order of the Appellate Authority defective for non-application of mind to the entire material on record. The Externing Authority has not at all mentioned this case under the PASA against the petitioner in its order. If the material under PASA was before the Externing Authority its copy should have been furnished to the petitioner and the Externing Authority should have applied its mind to the material on this score after affording opportunity of hearing to the petitioner. Since this was not done the principles of natural justice were violated by the Appellate Authority and the mind of the Appellate Authority should not have been influenced against the petitioner on account of registration of a case under the PASA in the year 1996.

8. Another argument has been that the Externing Authority at two places in the impugned order has mentioned that the activities of the petitioner amounted to breach of public order. Reference was made to Pages : 2 and 4 of english translation of the order of the Externing Authrity. It was contended that stray incidents between the petitioner and three witnesses, whose identity has not been disclosed, does not amount to disturbance of public order or prejudicial in maintenance of public order. The contention was rightly pressed in to service. More over the fact that the activities of the petitioner had adverse consequences in maintenance of public order were not notified in the notice. Consequently the Externing Authority travelled beyond the grounds narrated in the show cause notice upon which the petitioner was called upon to submit his reply. This has also rendered the impugned order invalid.

9. Another contention has been that the Externing Authority has not considered the less drastic remedy, viz. calling upon the petitioner to furnish surety Bonds for keeping good behaviour for a particular period should not have served the purpose and this omission also renders impugned order invalid.

10. A Division Bench pronouncement of this Court in Sabbirmiya Allarakha Saiyed V/s. Commissioner of Police, Vadodara, reported in 1995 (2) G.L.R. 1430 was cited. It may, however, be mentioned that the obiter dicta of the Division Bench is neither binding upon the Externing Authority and nor upon the Single Judge of this Court. Consideration of lesser drastic remedy, viz. impressing upon the petitioner to file surety bonds considered by the Division Bench in this case was in the nature of obiter dicta and is not the ratio of this case. Following observations were made by the Division Bench in this case :

> "Apart this, if in the first instance the less drastic remedy, viz. of taking surety bond of good behaviour is taken from the person against whom the notice under Sec.59 of the Act is issued then in a way, there is indeed nothing wrong in it for the simple reason that the concerned person is thereby given an opportunity to improve and behave well. In case, despite this opportunity being given of improving himself, if the concerned person misbehaves, the Externing Authority would be certainly not powerless in at once resorting to the extreme preventive remedy, viz. that of externment. Once again this

> suggestion of the Court should not be taken as binding down the Externing Authority to pass the order of less drastic remedy of seeking surety bond and not to pass externment order in each and every case. In fact, it is just a suggestion which the Externing Authority must bear in mind while passing the order of externment. (Emphasis supplied by me)."

It is, therefore, clear from the above portion (emphasis supplied by me) that the observation of the Division Bench is nothing but obiter dicta.

11. The last contention has been that the Externing Authority has passed the order of externment externing the petitioner from the districts of Vadodara and Kheda which is uncalled for. This discretion of the Externing Authority requires no interference in exercise of writ jurisdiction under Article 226 of the Constitution of India.

12. For the reasons given above, except on two grounds on which the petitioner has failed to succeed, on other grounds the impugned orders are rendered invalid. The petition, therefore, succeeds and is hereby allowed. The impugned orders contained in Annexure : A dated 1.10.1997 and Annexure : B dated 4.12.1997 are hereby quashed.

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